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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 In re] Case No. 01-54434-ASW
11 Mark Ngoc Huynh, aka]
12 Tung Ngoc Huynh,] Chapter 7
13 Debtor]
14 Bankruptcy Receivables Management,]
15 a California Corporation,]
16 Plaintiff,]
17 vs.] Adversary No. 01-5400
18 Mark Ngoc Huynh, aka]
19 Tung Ngoc Huynh,]
20 Defendant.]

21
22 MEMORANDUM DECISION
23 AFTER TRIAL

24 Before the Court is a complaint by Bankruptcy Receivables
25 Management ("Creditor"), assignee of Ben Bridge Jeweler
26 ("Jeweler"), against Mark Ngoc Huynh, the Debtor in this Chapter 7¹
27 case ("Debtor"). The complaint seeks determination that a debt of
28 \$6,229.65 plus interest is non-dischargeable pursuant to 11 U.S.C.
§§523(a)(2)(A) and (a)(6), and an award of attorney's fees and

¹ Unless otherwise noted, all statutory references are to Title 11, United States Code ("Bankruptcy Code"), as applicable to cases commenced on September 12, 2001.

1 costs.

2 The Creditor is represented by Richard Snyder, Esq. and the
3 Debtor represents himself. The matter has been tried and submitted
4 for decision. This Memorandum Decision constitutes the Court's
5 findings of fact and conclusions of law, pursuant to Rule 7052 of
6 the Federal Rules of Bankruptcy Procedure.

7
8 I.

9 FACTS

10 The Debtor filed a Chapter 7 petition on September 12, 2001.
11 It is undisputed that he owed the Jeweler \$6,229.65 at that time,
12 for the purchase of a watch in March 2001.

13 The Debtor testified that he had been employed by The Good Guys
14 since approximately 1998, as a salesman of electronic equipment.
15 He worked on a commission basis and said that the business was
16 somewhat seasonal, with January through March being the "slowest"
17 time of the year and December being the "best" month. His gross
18 income in 2000 was \$41,717.82 (of which \$21,645.69 was earned from
19 January through July), and in 2001 it was \$27,928.97 (of which
20 \$20,671.83 was earned from January through July²).

21 The Debtor completed an application for credit from the Jeweler
22 on March 17, 2001, which showed his monthly income to be \$5,000 --
23

24 ² Gross monthly earnings for that period in 2001 were as
25 follows:

26 January -- \$2,668.96
27 February -- \$2,068.10
28 March -- \$3,047.36 (\$2,185 net)
April -- \$2,581.16
May -- \$2,915.03
June -- \$2,888.73
July -- \$1,501.33

1 he testified that the amount was a "rough estimate". On March 23,
2 2001, in response to the Jeweler's request, the Debtor furnished a
3 copy of his 2000 "W-2 and Earnings Summary" ("W-2 Form"), and the
4 Jeweler opened a charge account for him that same day.

5 The Debtor testified that, on the day the account was opened,
6 he bought a man's Rolex watch ("Watch") for \$7,128, charging a
7 downpayment of \$1,425.60 to a VISA card and charging the \$5,702.40
8 balance of the purchase price to his new account with the Jeweler.
9 At the time of purchase, the Debtor signed a "Retail Charge
10 Agreement" ("Agreement"), which calls for monthly payments of at
11 least 10% of the outstanding balance, and includes a security
12 agreement that provides as follows:

13 I understand that [the Jeweler] retains a
14 security interest in the goods purchased on this
15 account until the unpaid balance of each separate
16 purchase is fully paid. Payments will be applied
17 to the earliest unpaid purchase. I agree not to
18 dispose of the goods, remove them from the
19 address listed, or encumber them without written
20 consent of [the Jeweler], and will protect [the
21 Jeweler] against all loss or damage of the goods
22 from the time they are delivered until I have
23 paid for them in full. [¶] In the event of
default of any scheduled payment, I understand
that at the option of [the Jeweler], my entire
account may become due and payable on demand. If
payment is not made on demand, [the Jeweler] may,
in the manner and as provided by law retake the
goods and pursue any further remedy provided by
law. I will pay reasonable collection costs and,
in the event the account is referred to an
attorney, reasonable attorney fees and costs,
whether or not suit is commenced.

24 The Debtor testified that he sent one payment for the Watch,
25 but the check was lost in the mail. He said that he did not
26 remember the number, date, or amount of the check.

27 The Debtor testified that he sold the Watch for \$2,500 in July
28 2001. He said that he also made four other sales, which are set

1 forth in the Statement of Financial Affairs filed in the bankruptcy
2 case, but he could not recall whether he had made more sales in
3 addition to those listed. The Statement of Financial Affairs
4 states that transfers made within one year preceding the petition
5 filing date of September 12, 2001 were as follows:³

6 26 inch TV sold to Tom - 5/00 for \$500

7 24 inch TV, DVD sold to Tien - 8/00 for
8 \$125

9 Computer/monitor sold to Jimmy - 7/00 for
10 \$600

11 Men's designer watch - sold to Jimmy's friend -
12 7/00 for \$2500

DVD, speakers, rims - sold to Tim for \$1500
5/00⁴

13 The Debtor testified that, with the exception of the Watch, he
14 could not recall when he purchased any of this property. He said
15 that he sold these items because his income "was substantially
16 reduced" and he "needed the money". He also said that, when these
17 sales were made, he had no credit available and was trying to pay
18 off his accounts instead of charging more -- he did not recall
19 whether he actually did stop making charges and said that he used
20 his credit cards "on a daily basis" to pay for such items as
21 gasoline and food, and could not remember each transaction.⁵

23 ³ The Debtor testified that each of the dates was
24 erroneously shown to be in 2000 and should instead have been shown
to be in 2001.

25 ⁴ The Debtor testified that he never received payment from
26 this buyer.

27 ⁵ The schedules of unsecured non-priority claims filed in
28 the bankruptcy case set forth, in addition to the Jeweler, nineteen
creditors holding claims totalling \$58,990.30 (each described as
being for "Charge/Purchase"), but do not show when any debt was
incurred.

1 The Debtor testified that he used the proceeds from selling the
2 Watch and the other items to "pay bills, debts to people I owe,
3 friends, relatives, family". He acknowledged that the Statement of
4 Financial Affairs filed in the bankruptcy case states that no
5 payments exceeding \$600 were made to creditors within ninety days
6 pre-petition and no payments were made to "insiders" within one
7 year pre-petition, but said that he had not understood those
8 questions when he completed the form. The Debtor testified that he
9 did not deposit the sale proceeds in his checking account, and his
10 bank statements for May 11, 2001 to September 10, 2001 (roughly the
11 period when the sales were made) do not reflect any such deposits.
12 He said that he made payments to creditors with cash and money
13 orders as well as by check (but none of the creditors listed in the
14 bankruptcy schedules were paid by check), although he could not
15 recall who was paid what amount at what time -- the bank statements
16 for the aforesaid four month period reflect seven checks totalling
17 \$3,630.

18 Bruce Jackman ("Jackman") testified that he and his wife are
19 sole shareholders of the Creditor, he is its President, and the
20 Creditor received the Jeweler's claim against the Debtor by
21 assignment. Jackman testified about a credit report received by
22 the Jeweler in connection with the Debtor's application for the
23 charge account in March 2001, and another credit report received by
24 the Creditor after commencement of the Debtor's bankruptcy case.
25 The first report lists twenty-one open accounts with eight
26 outstanding balances totalling approximately \$26,300, no single
27 balance exceeding the account limit, and no failure to pay. The
28 two reports together show that the Debtor's total outstanding debt

1 for credit cards and charge accounts in March 2001 was \$31,094.11
2 less than the total unsecured non-priority debt scheduled in his
3 bankruptcy case approximately six months later (exclusive of the
4 debt owed to the Jeweler). Those reports also show that the Debtor
5 opened four accounts near the time that he opened the account with
6 the Jeweler: First USA in January 2001; Capital One in February
7 2001; Micro Center and MBNA in March 2001. Jackman testified that
8 the Jeweler's records show no payments made on the Debtor's
9 account, and an outstanding balance of \$6,229.65 on the date of
10 bankruptcy.

11 The Debtor testified that he made "all these charges" because
12 he "was making good money at the time" and "I figure if you make
13 good money you be spending a lot", so "there was charges but that
14 was when I was making good money". He said that "when I wasn't
15 making that good of money is when I had to start selling product to
16 keep up with my living at the same time paying bills".
17 Specifically with respect to the Watch, the Debtor pointed out that
18 the Agreement states "PURCHASER UNDERSTANDS THAT WATCHES CANNOT BE
19 RETURNED IF ALTERED OR WORN", and said "if there's doubt why I
20 didn't return it". The Debtor testified that, when he bought the
21 Watch, he intended to pay for it.

22 II.

23 ANALYSIS

24 The Creditor seeks a determination that Debtor's debt to the
25 Jeweler (which has been assigned to the Creditor) is non-
26 dischargeable in bankruptcy, under §523(a)(2)(A) and/or §523(a)(6).
27
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1 The element of promproximately caused damage has been established.
2 It is undisputed that the Debtor bought the Watch from the Jeweler,
3 paid \$1,425.60 of the purchase price with a charge to a credit
4 card, charged the \$5,702.40 balance of the price to his new account
5 with the Jeweler, failed to make any payments on that account,
6 sold the Watch to a third party four months later, and did not turn
7 the sale proceeds over to the Jeweler. As a result of the Debtor's
8 actions, the Jeweler was deprived of both the Watch and most of its
9 purchase price.

10 The element of the Jeweler's justifiable reliance has also been
11 established. With respect to similar transactions such as charging
12 purchases or cash advances to credit cards, the Ninth Circuit has
13 held that a creditor "justifiably relies on a representation of
14 intent to repay as long as the account is not in default and any
15 initial investigations into a credit report do not raise red flags
16 that would make reliance unjustifiable", In re Anastas, 94 F.3d
17 1280, 1286 (9th Cir. 1996) ("Anastas"), citing In re Eashai, 87
18 F.3d 1082, 1091 (9th Cir. 1996) ("Eashai"). In this case, the
19 purchase of the Watch was the first activity on the new account, so
20 there were no defaults at the time of purchase. Before opening the
21 account, the Jeweler received the Debtor's written application
22 showing him to be employed, his W-2 Form stating income from the
23 same employer totalling \$41,717.82 for the previous year, and a
24 credit report listing twenty-one open accounts with eight
25 outstanding balances totalling approximately \$26,300. The amount
26 of debt reflected on the credit report is over 50% of the Debtor's
27 gross earnings for the preceding year, although no individual
28 balance exceeded account limits and the report did not show failure

1 to make payments. The actual minimum monthly payments specifically
2 reflected on the credit report for Debtor's other debts are as
3 follows:

4	MBNA America	\$143
5	Fleet CC	\$183
6	Citibank Gold	\$104
7	Bank America	\$ 93
8	Banana/MCCBG	\$ 16
9	First USA Bank	<u>\$ 12</u>
10		\$551

11 In addition, Debtor would owe a minimum monthly payment on the
12 credit card to which he charged the \$1,425.60 downpayment -- in
13 this Court's experience with similar cases, such payments are
14 generally approximately 2% of the outstanding balance, which would
15 be approximately \$28, which would increase the above total to \$579.
16 The monthly payment required for the Watch was 10% of the
17 outstanding balance, or approximately \$570. The sum of those two
18 totals is \$1,149. Debtor's net income in March 2001 when he
19 purchased the Watch was \$2,185, which information was available to
20 the Jeweler at the time of purchase. The difference between \$1,135
21 in required payments and \$2,185 in net income shows that Debtor had
22 only \$1,036 per month for all of his other living expenses, after
23 making payments on all accounts. It appears to the Court from the
24 foregoing analysis that Debtor could not afford the Watch, which
25 should have been evident to the Jeweler as well because the Jeweler
26 had all of the above information. However, Creditor retained a
27 security interest in the Watch and was substantially protected by
28 such interest. Moreover, Creditor did not know Debtor's actual

1 monthly expenses -- it was possible, for example, that Debtor lived
2 with his parents and had very low monthly expenses. Therefore,
3 under the particular facts of this case, this Court is not prepared
4 to find that there was a "red flag" which should have precluded the
5 Jeweler from making this sale on these terms. Moreover, there was
6 no evidence of what might constitute a "red flag" in the Jeweler's
7 experience or under typical industry standards, so a subjective
8 analysis cannot be made. Applying an objective test, the
9 information in the credit report (especially Debtor's credit
10 history and the fact that there were no defaults on any of his
11 accounts) is not so extreme that a hypothetical reasonable creditor
12 would consider the Debtor a very bad credit risk for a secured loan
13 of less than \$6,000.

14 The remaining elements are a false representation of an intent
15 to pay, made for the purpose of deceiving. With respect to those
16 elements, the Ninth Circuit has rejected the "implied
17 representation" and "assumption of the risk" theories used in other
18 jurisdictions, and has adopted the "totality of the circumstances"
19 approach, under which "a court may infer the existence of the
20 debtor's intent not to pay if the facts and circumstances of a
21 particular case present a picture of deceptive conduct by the
22 debtor", Eashai, at 1087. The issue here is whether the Debtor
23 charged the Watch to the account while secretly intending to leave
24 the account unpaid. The Debtor said that he did intend to pay when
25 he bought the Watch -- he also said "I figure if you make good
26 money you be spending a lot" and "there was charges but that was
27 when I was making good money" -- that testimony implies that he
28 made charges only because he was earning "good money" and would not

1 have incurred debt if he were not able to pay it, which in turn
2 implies that he charged the Watch to his account with the intention
3 of paying the account's balance. However, under Eashai, the Court
4 is not limited to considering the Debtor's testimony, and his
5 intent may be inferred from the totality of the circumstances --
6 those are as follows:

7 The Debtor's application for a charge account with the
8 Jeweler significantly overstated his income at \$5,000 per month.
9 He testified that the figure was a "rough estimate", but there is
10 no basis for such an estimate having been made in good faith. The
11 Debtor's \$41,717.82 gross income for the previous year was a
12 monthly average of less than \$3,500, and his gross income to date
13 in the year of purchase was far less than \$5,000 per month:
14 \$2,668.96 in January, \$2,068.10 in February, and \$3,047.36 in
15 March. There was no evidence that he had ever earned \$5,000 per
16 month, or had any reason to think that he would do so in the near
17 future (e.g., bonus programs at work, a second job, etc.).

18 In May 2001, some two months after charging the Watch, the
19 Debtor sold a television set for \$500 and "DVD, speakers, rims" for
20 \$1,500. He testified that he did so because his income "was
21 substantially reduced" and he "needed the money", but the facts
22 adduced at trial do not show that -- gross income was \$2,581.16 in
23 April and \$2,915.03 in May, more than the Debtor had earned in any
24 month that year except March (when he earned only slightly more at
25 \$3,047.36).⁶ Two months later, in July 2001, the Debtor's income
26 did drop significantly, to \$1,501.33 (and he earned only \$7,257.14
27

28 ⁶ If Debtor needed this money for other reasons, he did not
testify to such reasons at trial.

1 during the remaining five months of the year) -- in that month, he
2 sold the Watch for \$2,500 and "computer/monitor" for \$600; the next
3 month, he sold a television set for \$125. The Debtor testified
4 that he did not recall whether he had also sold other property
5 during the year prior to commencement of his bankruptcy case in
6 September 2001. According to the Debtor, he used all of the sale
7 proceeds to "pay bills"-- his checking account reflects no deposits
8 of the sale proceeds and scant check activity during the sale
9 period, but he testified that he made some payments by cash and
10 money order as well as by check -- regardless of how payments were
11 made, he said that he could not recall who was paid, or in what
12 amounts, or at what times.

13 When the Debtor bought the Watch in March 2001, he held
14 twenty-one open accounts with eight outstanding balances that
15 totalled over \$26,000. Two of those accounts had just been opened,
16 one in January and one in February -- two more accounts were opened
17 in March, the month in which the Watch was purchased. By the time
18 bankruptcy was filed in September, the Debtor had incurred
19 additional credit card and charge account debts totalling over
20 \$31,000.

21 The Debtor bought the Watch by charging a downpayment of
22 \$1,425.60 to a credit card and charging the \$5,702.40 balance of
23 the purchase price to the account that he opened with the Jeweler
24 on the date of purchase. No payments were ever made on the
25 account. The Debtor testified that he did send one payment but it
26 was lost in the mail; he said that he could not recall the check
27 number, date, or amount -- he did not testify that he stopped
28 payment on the lost check and issued a replacement, or otherwise

1 attempted to make payments on the account.

2 The totality of the circumstances in this case does "present a
3 picture of deceptive conduct" as discussed by Eashai, and it also
4 suggests that the Debtor was deliberately "loading up" debt with
5 the intention of discharging it in bankruptcy rather than paying
6 it, which is an example of fraudulent intent cited by Anastas. The
7 Debtor's very first contact with the Jeweler was not forthright,
8 when he inflated his income by over 50% in his application for a
9 charge account.⁷ Despite the Debtor's protestations that he only
10 spent when he was earning, the fact is that he never made a monthly
11 payment on his account with the Jeweler, even though he earned
12 substantially the same amounts in April through June that he earned
13 when he bought the Watch in March -- he claimed to have sent one
14 payment that was lost in the mail, but did not explain why he did
15 not replace that and then made no other payments (even after he
16 sold the Watch for \$2,500 in July, which he said was used to "pay
17 bills" that he could not identify).⁸ Nor did he provide a check
18 register listing the missing check. The "spending spree" that
19 increased the Debtor's debts by over \$31,000 during the six month
20 period immediately prior to bankruptcy occurred primarily after the
21 Watch was purchased, but it demonstrates a pattern of amassing debt
22 on the eve of bankruptcy, which bears upon the issue of whether the

24 ⁷ As noted above, the Jeweler did not rely on this
25 statement of income, but instead required the Debtor to provide a
W-2 Form for calendar year 2000.

26 ⁸ By contrast, the debtor in Anastas was insolvent and
27 suffered from a "serious gambling problem", with no realistic
prospect of being able to pay his credit card debt in full -- yet
28 he did make payments for six months and then attempted to arrange a
payment schedule that he could meet. Such efforts were held to be
inconsistent with making charges that he did not intend to pay.

1 Debtor ever intended to pay for the Watch. The Debtor testified
2 that, during this period, he was trying to pay off his accounts and
3 incur no new debt, but he also said that he used credit cards daily
4 and did not recall whether he ever stopped -- the only evidence of
5 any attempt to pay accumulated debts was the Debtor's testimony,
6 which included no specific information about payments made and was
7 not well supported by the records of minimal activity in his
8 checking account. In general, the Debtor's testimony was not
9 credible (primarily because most of it consisted of his claimed
10 inability to recall virtually anything⁹ and, as discussed above,
11 much of the remainder of his testimony was contradicted by
12 undisputed facts).

13 Creditor has established that the debt to the Jeweler is non-
14 dischargeable as one arising from fraud, pursuant to §523(a)(2)(A).

15
16 C. §523(a)(6)

17 A debt arising from willful, malicious damage to the property of
18 another is excepted from discharge pursuant to §523(a)(6). The
19 elements of a claim under this statute have been established by In
20 re Jercich, 238 F.3d 1202, 1208-09 (9th Cir. 2001) ("Jercich"):

21 We hold, consistent with the approaches taken by
22 the Fifth and Sixth Circuits, that under [Kawaauhau,
23 et vir., v. Geiger, 523 U.S. 57, 118 S.Ct. 974
24 (1998)], the willful injury requirement of § 523
25 (a)(6) is met when it is shown either that the
26 debtor had a subjective motive to inflict the
27 injury or that the debtor believed that injury
was substantially certain to occur as a result
of his conduct. ... A malicious injury involves
(1) a wrongful act, (2) done intentionally, (3)
which necessarily causes injury, and (4) is done
without just cause or excuse. [internal quotation

28 ⁹ The Debtor answered that he did not recall or remember in
response to 69 questions.

1 marks and citation omitted]
2 The Ninth Circuit noted in In re Su, 290 F.3d 1140, 1148 (9th Cir.
3 2002) ("Su") that willfulness and malice are two separate
4 requirements that are not to be "conflated" into a single inquiry,
5 and made it clear that each alternative prong of the willfulness
6 showing must be based on a subjective standard:

7 The subjective standard correctly focuses on the
8 debtor's state of mind and precludes application
9 of § 523(a)(6)'s nondischargeability provision
10 short of the debtor's actual knowledge that harm
11 to the creditor was substantially certain.
12 Su, at 1146.

13 The willful and malicious injury that is claimed here is the
14 Debtor's sale of the Watch (which was subject to the Jeweler's
15 security interest) without turning the proceeds over to the Jeweler.
16 As discussed above, this Court finds that the Debtor bought the
17 Watch without intending to pay for it. Accordingly, it follows that
18 the Jeweler would never receive payment and its only recourse would
19 be repossession of its collateral (or the proceeds thereof). The
20 Debtor rendered repossession impossible by selling the Watch to
21 "Jimmy's friend" four months after purchase and giving the proceeds
22 to "people I owe, friends, relatives, family" whose names he could
23 not recall -- the Debtor did so after signing the Agreement, which
24 provided for the Jeweler's security interest in the Watch and also
25 stated "I agree not to dispose of the goods, remove them from the
26 address listed, or encumber them without written consent of [the
27 Jeweler], and will protect [the Jeweler] against all loss or damage
28 of the goods from the time they are delivered until I have paid for
29 them in full". Under such circumstances, the Debtor must be charged
30 with knowledge that injury was substantially certain to occur as a

1 result of his conduct, since he was depriving the Jeweler of its
2 collateral, which was its sole source of the recovery to which it
3 was entitled by the Agreement. The sale was an intentional and
4 wrongful act, because Debtor had agreed not to dispose of the Watch
5 but voluntarily sold it. Debtor's testimony implied that he did not
6 return the Watch because the Agreement states "PURCHASER UNDERSTANDS
7 THAT WATCHES CANNOT BE RETURNED IF ALTERED OR WORN", which is a
8 relevant, significant fact. However, the Agreement also states that
9 the Jeweler may "retake the goods" when they are not paid for, which
10 makes it clear that the Jeweler had a right to recover the Watch
11 when the Debtor failed to make the required payments on the charge
12 account.

13 Creditor has established that the debt to the Jeweler is non-
14 dischargeable as one arising from willful and malicious damage to
15 property, pursuant to §523(a)(6).

16

17 D. Attorney's Fees And Costs

18 The Creditor seeks attorney's fees and costs, citing no
19 authority. With respect to those expenses, the Agreement provides
20 as follows:

21 If payment is not made on demand, [the Jeweler]
22 may, in the manner and as provided by law retake
23 the goods and pursue any further remedy provided
24 by law. I will pay reasonable collection costs
and, in the event the account is referred to an
attorney, reasonable attorney fees and costs,
whether or not suit is commenced.

25 The expenses sought by the Creditor are those incurred in this
26 Adversary Proceeding. However, an award of attorney's fees is not
27 permitted in the Ninth Circuit under the circumstances of this case.

28 Attorney's fees may be awarded to an unsecured

1 creditor in a bankruptcy proceeding only to the
2 extent that state law governs the substantive
3 issues and authorizes the court to award fees.
4 Renfrow v. Draper, 232 F.3d 688, 694 (9th
5 Cir.2000). ... Under Renfrow, a creditor can
6 recover attorney's fees incurred in connection
7 with litigating the validity of a contract, even
8 if the ultimate issue in the case is one of
9 bankruptcy law. By contrast, the mere presence
10 of an attorney's fees provision in the contract
11 giving rise to the debt at issue does not entitle
12 a prevailing party to attorney's fees. See In re
13 Hashemi, 104 F.3d 1122, 1127 (9th Cir.1996)
14 ("[T]he question of the applicability of the
15 bankruptcy laws to particular contracts is not a
16 question of the enforceability of a contract but
17 rather involves a unique, separate area of
18 federal law.") (citing In re Coast Trading Co.,
19 744 F.2d 686, 693 (9th Cir.1984)). Our past
20 cases awarding attorney's fees to prevailing
21 debtors conform to the same basic principles.
22 See In re Baroff, 105 F.3d 439, 440-42 (9th
23 Cir.1997) (awarding fees incurred by a prevailing
24 party debtor in defending a state law fraudulent
25 inducement claim, but refusing to award fees
26 incurred in connection with a related issue of
27 bankruptcy law). [W]e believe that a
28 prevailing party should not be entitled to
attorney's fees for litigation of state law
issues merely tangential to an issue of federal
bankruptcy law. This conclusion is consistent
with our prior cases, in which we have awarded
attorney's fees to prevailing bankruptcy parties
only where the validity or enforceability of a
contract was expressly at issue.

19 Thrifty Oil vs. Bank of America, 322 F.3d 1039, 1040-1041 (9th Cir.
20 2003) ("Thrifty Oil"). In this case, the validity or enforceability
21 of the Agreement between the Jeweler and the Debtor is not at issue
22 because the Debtor does not contest that he owes the debt claimed.
23 The only issues raised by the Creditor's complaint, and the only
24 issues tried, are whether the acknowledged debt is dischargeable in
25 bankruptcy. It is undisputed that the Creditor's claim is unsecured
26 so, under Thrifty Oil, attorney's fees would be recoverable only to
27 the extent that "state law governs the substantive issues and
28 authorizes the court to award fees" (emphasis supplied). Regardless

1 of whether state law may or may not authorize fee shifting with
2 respect to this contract and the complaint in this Adversary
3 Proceeding, the fact remains that the substantive issues are
4 governed entirely by bankruptcy law and not by state law.

5 Pursuant to Thrifty Oil, the Creditor is not entitled to an
6 award of attorney's fees for litigating the complaint in this
7 Adversary Proceeding. The Creditor is entitled to recover its cost
8 for the fee charged to file the complaint, pursuant to Rule 7054(b)
9 of the Federal Rules of Bankruptcy Procedure.

10

11 E. Interest

12 The Creditor seeks an award of pre-judgment interest, citing no
13 authority and stating no rate.

14 The Agreement between the Jeweler and the Debtor does not
15 provide for interest. It does call for late charges and "finance
16 charges", which are included in the \$6,229.65 balance that existed
17 on the date of bankruptcy. Finance charges and interest are two
18 different things, the former applying to credit sales and the latter
19 to loans or forbearance of money, see Boerner vs. Colwell Co., 21
20 Cal.3d 37 (1978) (In Bank).

21 California Civil Code §3289(b) provides that "If a contract
22 entered into after January 1, 1986, does not stipulate a legal rate
23 of interest, the obligation shall bear interest at a rate of 10
24 percent per annum after a breach". The Creditor is therefore
25 entitled to pre-judgment interest at the rate of 10% from the
26 bankruptcy filing date of September 12, 2001 until entry of
27 judgment. Thereafter, the Creditor will be entitled to post-
28 judgment interest at the rate that is provided by 28 U.S.C. §1961 on

1 the date that judgment is entered, until the judgment is fully
2 satisfied.

3

4

CONCLUSION

5

For the reasons hereinabove set forth:

6

1/ The Creditor is entitled to judgment determining that
7 the debt of \$6,229.65 owed by the Debtor to the Jeweler, plus pre-
8 judgment interest at the rate of 10% from the bankruptcy filing date
9 of September 12, 2001 until entry of judgment, is excepted from
10 discharge pursuant to §§523(a)(2)(A) and (6).

11

2/ The Creditor is entitled to an award of costs in the
12 amount of the fee charged to file the complaint in this Adversary
13 Proceeding.

14

3/ The Creditor is not entitled to an award of attorney's
15 fees or other costs.

16

4/ The Creditor is entitled to post-judgment interest at
17 the rate provided by 28 U.S.C. §1961 on the date that judgment is
18 entered, until the judgment is fully satisfied.

19

Counsel for the Creditor shall submit a form of judgment so
20 providing, after review by the Debtor as to form.

21

Dated:

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ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

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